No. 3953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FORBES P. HASKELL, as Receiver of Scandinavian-American Building Company, a corporation, *Appellant*,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al, *Appellees*,

BEN OLSON COMPANY, a Corporation, *Appellant*,

vs.

McCLINTIC-MARSHALL COMPANY, a corporation, et al, *Appellees*,

BRIEF OF BEN OLSON COMPANY, APPELLANT

STILES & LATCHAM,

Attorneys for Appellant,

Ben Olson Co.

Tacoma, Wash.

Filed this.....day of February, 1923

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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INDEX

REFERENCES TO EXHIBITS

MISCELLANEOUS

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Statement of the Case

The action was commenced by the McClintic-Marshall Company to foreclose a material man's lien upon Lots 10, 11 and 12, in Block 1003, in the City of Tacoma, Pierce County, Washington, and was heard upon the Complainant's Amended Com-

plaint, and the Answers and Cross-Complaints or Counterclaims of the several defendants, some thirty in number. All of the defendants except the Scandinavian American Building Company, represented by its Receiver, Forbes P. Haskell, and the Scandinavian American Bank, represented by the State Bank Supervisor, J .P. Duke, were lien claimants and all, with the single exception of Ben Olson Company, were awarded judgments for various sums, and a decree foreclosing their liens. Ben Olson Company was awarded a general judgment, only. Several other defendants were awarded foreclosure decrees for part of their judgments, only, with general judgments for the remainder. This appellant complains of none of the other awards except that to the Scandinavian American Bank which was a general judgment against the Scandinavian American Building Company for $232,136.62 and interest in the sum of $19,136.62, with a rank the same as that of the appellant, (Decree Par. XXXVIII. Record p. 524).

The Pleadings

The Complainant's Amended Complaint, (Record p. 23), contained the usual allegations necessary to sustain such a cause of action.

Appellant's Pleading

Appellant's case was heard upon its Amended Answer and Cross-Complaint to the Complainant's

Amended Complaint (Record p. 290); the Answer and Cross-Complaint of the Scandinavian American Bank and J. P. Duke, Supervisor, etc., (Record p. 73; the Answer and Cross Complaint of the Scandinavian American Building Company and Forbes P. Haskell, Receiver (Record p. 323); and the Answer and Cross-Complaint of the Far West Clay Company to the Answer and Cross-Complaint of the Scandinavian American Bank, and J. P. Duke, Supervisor, (Record p. 400); said Far West Clay Company's Answer and Cross-Complaint being stipulated by all parties to be the answer and Cross-Complaint of all the other defendants, except the Scandinavian American Building Company, and Forbes P. Haskell, Receiver (Record p. 421). The Scandinavian American Building Company, and its Receiver, Forbes P. Haskell, will be hereinafter mentioned as "the Building Company", and the Scandinavian American Bank and J. P. Duke, Supervisor, will be mentioned as "the Bank".

Appellant's Amended Answer and Cross-Complaint proceed, as follows:

Paragraph I, (Record p. 292), alleged its corporate existence.

Paragraph II, (Record p. 292), alleged corporate existence of the Bank, and the official capacity of John P. Duke, as Supervisor of Banking of the State of Washington; of Forbes P. Haskell, as Assistant Supervisor in charge of the Bank in

plaint, and the Answers and Cross-Complaints or Counterclaims of the several defendants, some thirty in number. All of the defendants except the Scandinavian American Building Company, represented by its Receiver, Forbes P. Haskell, and the Scandinavian American Bank, represented by the State Bank Supervisor, J .P. Duke, were lien claimants and all, with the single exception of Ben Olson Company, were awarded judgments for various sums, and a decree foreclosing their liens. Ben Olson Company was awarded a general judgment, only. Several other defendants were awarded foreclosure decrees for part of their judgments, only, with general judgments for the remainder. This appellant complains of none of the other awards except that to the Scandinavian American Bank which was a general judgment against the Scandinavian American Building Company for $232,136.62 and interest in the sum of $19,136.62, with a rank the same as that of the appellant, (Decree Par. XXXVIII. Record p. 524).

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liquidation; also the official character of Forbes P. Haskell, as receiver of the Building Company.

Paragraphs III to VIII, inclusive, (Record p. 293 to 295), alleged character and citizenship of other defendants.

Paragraph IX, (Record p. 295), alleged amount in controversy over $3,000.00.

Paragraph X, (Record p. 296), alleged that November 1, 1919, and prior thereto the Bank was the owner of said Lots 10 and 11, Block 1003, Tacoma, and occupied the building thereon as its banking office; and that desiring to enlarge its banking facilities and provide more extensive and elaborate quarters, it employed one, Weber, an architect of Philadelphia, Pa., to prepare plans and drawings of a proposed building thereon, and subsequently said Weber prepared and delivered to the Bank plans and drawings for such building.

Paragraph XI, (Record p. 296), alleged that after receiving said plans and drawings and to avoid the appearance to the general public that it was using its resources for building purposes, the Bank caused certain of its directors and stockholders, viz: J. E. Chilberg and Gustav Lindberg to execute Articles of Incorporation of the Building Company, with a capital stock of $200,000., designating as its trustees, J. E. Chilberg, O. S. Larson, Jafet Lindeberg, Gustav Lindberg, Charles Drury, James R. Thompson and George G. Williamson,

who were, also, all the directors of the Bank, to serve for the first six months; and that said Larson, as President of the Bank subscribed for all of the Capital stock of the Building Company, except one share for each of the other trustees, to qualify them.

Paragraph XII, (Record p. 297), alleged that on February 9, 1920, the Bank purchased Lot 10, in Block 1003, from Director Drury.

Paragraph XIII, (Record p. 297), alleged that on or about March 20, 1920, the Bank, without any consideration, although its value was over $100,000, conveyed Lots 11 and 12 to the Building Company; and that thereupon the Bank, in pursuance of its said plans and in the name of the Building Company, but as its agent and trustee, entered upon the construction of a sixteen-story building, to cost in excess of $1,200,000; and that thereafter said building operations, negotiating for contracts for materials and work thereon, and all business of every kind in connection therewith, was carried on and conducted by the Principal Officers of the Bank, and all payments for materials, labor and other service were made by the Bank.

Paragraph XIV, (Record p. 297), alleged, that on or about March 10, 1920, the Bank caused the Building Company to execute and record a mortgage on said real estate to one, G. Wallace Simpson, to secure the payment of $600,000; but no consid-

eration was paid or advanced or contracted to be paid or advanced thereunder; and that on or about January 21, 1921, and after the insolvency of the Bank, it caused said Simpson, without any consideration therefor to assign said mortgage to it; and that, also, shortly after the Bank had been declared insolvent, and placed in the hands of the State Bank Commissioner, he, without any lawful authority procured an assignment to be executed to him of a certain mortgage on said real estate, to secure $70,000, and claims title thereto.

Paragraph XV, (Record p. 298), alleged that on the 27th day of February, 1920, the Bank procured its directors to enter into a contract with appellant, in the name of the Building Company, by said Drury, its President, but in behalf of the Bank, for the plumbing and heating materials of said building for the sum of $91,000, of which $1,000, was to be paid and was paid by the sale and delivery of the radiators in the old building. $90,000 was contracted to be paid by 75% of monthly estimates of labor and materials. Copy of Contract annexed, as Exhibit A. (Record p. 309).

Paragraph XVI, (Record p. 299), alleged that appellant complied with all the terms of its contract; and commencing July 1, 1920, furnished and delivered to said premises materials of the value of $24,633.07.

Paragraph XVII, (Record p. 300), alleged that appellant procured ready for delivery, and stored

in its warehouse other materials for the plumbing in said building, not adapted to any other building, of the value of $8,125.00.

Paragraph XVIII, (Record p. 300), alleged that appellant procured 86 closets complete, with fixtures, adapted to said building but not to any other, from Crane Company, and was charged therewith, parts of which closets were delivered to said building, and the remaining parts of which were stored in Crane Company's warehouse in Tacoma, of the value (remainder parts) of $6,-132.66.

Paragraph XIX, (Record p. 301), alleged that appellant procured from Crane Company certain toilet room and lavatory materials and fixtures, adapted only to said building, and charged to appellant, ready for delivery and stored in Crane Company's warehouse, in Tacoma, of the value of $12,910.76.

Paragraph XX, (Record p. 301), alleged that all of said materials and fixtures not actually delivered on said premises were procured by appellant in time and would have been delivered and put in place within the time provided by the contract, but for the fact that the construction of the building was delayed by the owners and the steel contractor thereof (complainant) and could neither be placed on the premises nor erected.

Paragraph XXI, (Record p. 301), alleged that

appellant performed labor in construction, which continued to January 15, 1921, of the value of $2,279.80.

Paragraph XXII, (Record p. 301), alleged that $13,425.56 of the $91,000 had been paid.

Paragraph XXIII, (Record p. 302), alleged that to complete appellant's contract would have cost:

In Materials	$16,691.64
In Labor	11,196.70
Total	$27,888.34

which, after deducting materials and labor already furnished and done, would have left appellant a profit of $8,029.77, but for the fact that whereas the construction of the building was proceeded with so that on the 15th of January, 1921, the steel framework was practically completed, and appellant had been able to install a small part of its plumbing and heating materials and awaited the progress of the other contractors to permit it to install the remainder thereof, when due to the failure of the Bank, the work ceased and the contract was terminated, said Bank and Building Company having failed to pay 75% of materials and labor valued at $19,050.90 theretofore on the 4th day of January certified as furnished.

Paragraph XXIV, (Record p. 302) alleged:

> "That this defendant, Ben Olson Company, was, at all times ready, able and willing to proceed with said plumbing and heating work,

under said contract, and would have proceeded with and completed the same, and would have earned the said profit of $8,029.77, but for the following facts to-wit:

"The construction of said building was proceeded with, so that on the 15th day of January, 1921, the steel framework thereof was practically completed, and this defendant had been able to install a small part of the plumbing and heating materials, and awaited progress of the other contractors to permit it to install the remainder thereof, but on the 15th day of January, the said Scandinavian American [223] Bank of Tacoma, which had provided and paid the money necessary for cash payments for the construction of said building up to that time, became insolvent, and its affairs were taken possession of by the said Claude P. Hay, as State Bank Commissioner (whose successor in office is defendant John Duke, Supervisor of Banking), who proceeded to liquidate it, with the assistance of the said Forbes P. Haskell, as Deputy State Bank Comissioner, and, thereafter, and on said 15th day of January, 1921, and because of the insolvency of said Scandinavian American Bank of Tacoma, and said Hay, as such State Bank Commissioner, and said Scandinavian American Building Company; and said Scandinavian American Bank of Tacoma, and said Scandinavian American Building Company failed, neglected and refused to pay to this defendant the sum of $14,288.18, being 75% of the value of the materials and labor of the value of $19,050.90, which had been theretofore certified as delivered and performed, on the 4th day of January, 1921, by the Architect of said building; whereupon and wherefore, this defendant was compelled to cease all work on said building, and said contract was terminated."

Paragraph XXV, (Record p. 304), alleged the filing of appellant's notice of lien on the 14th day of April, 1921, for $41,666.52; copy attached as "Exhibit B", (Record p. 319).

Paragraph XXVI, (Record p. 304), alleged that no other action had been commenced by appellant for the sum due it; and that it had presented to the State Bank Commissioner its claim as a creditor of said Bank, which had been disallowed.

Paragraph XXVII, (Record p. 305), alleged facts in avoidance of Section XIV, of the contract relating to waiver of lien, which were sustained by the decision of the Court. (Record pp. 441-2).

The prayer of appellant was for judgment in the sum of $49,686.10, less such sum as should be awarded to Crane Company, upon its lien claim; and for an attorneys' fee of seven per cent, and costs; that $41,666.32, less any sum awarded to Crane Company, with interest, attorney's fee and costs be adjudged a lien; that $8,029.77 included in such judgment, with the interest thereon, be adjudged and allowed as a claim established against the property and assets of the Bank in liquidation, in the hands of the Supervisor of Banking; that the lien be foreclosed; and the property sold; that any deficiency remaining after the sale and application of the proceeds to appellant's lien be likewise adjudged and allowed as a claim established against the property and assets of the Bank, in liquidation

in the hands of the Supervisor of Banking; and for other proper relief.

The Proof

With confidence it is asserted that all of the allegations of appellant's Cross-Complaint were proven substantially as laid. The exceptions to exact proof were only in some small variations in amounts, and in the correction of slight errors in statement, as, for example:

Paragraph XI, (Record p. 296), alleged that Larson, President of the Bank, subscribed for all the shares of the Building Company, but one for *each* of the other trustees, whereas, he subscribed for 1,996 of the 2,000 shares, leaving only four shares to the other six trustees. (Exhibit 178, p. 17; Record p. 1256.)

Paragraph XII, (Record p. 297), alleged that the Bank purchased Lot 10 from Drury and wife, whereas the purchase was from "Drury, the Tailor" a Drury family corporation; and, although the Bank paid the consideration, $65,000, the conveyance was made directly to the Building Company. (Record p. 1251; Ex. 332; 1064, Larson; 1234-5, Geiger; Am. . . of Duke, Record pp. 89.90).

Paragraph XIV, (Record p. 297), alleged that the $600,000 mortgage to Simpson was assigned by the latter to the Bank January 21st, 1921, where-

as, the assignment was made Oct. 7, 1920, (Record p. 1004), and the recording was in January, 1921, after the failure (Record p. 1005).

Pleadings of the Bank and Commissioner of Banking

The Bank and the Supervisor of Banking, by their Cross-Complaint, (Record pp. 81-85), claimed to own and the right to foreclose a certain $70,000 balance of a mortgage on Lots 11 and 12; and also, the right to foreclose an alleged purchase money lien for $350,000, on Lots 10, 11 and 12, (Record pp. 89-92). The former was disallowed by the Court, (Record pp. 442-4-521) except as an inferior claim, and the latter was abandoned and dismissed, (Record p. 522).

But the same parties also claimed to be entitled to recover $432,822.99, against the Building Company, for advances made for the building construction, and to have the amount established as a lien under the assignment of the $600,000 mortgage made by the Building Company, to Simpson, and by him assigned to the Bank. The Court held the assignment void, but found that the Bank had advanced $232,094.42, to the Building Company and rendered judgment against it, without lien, for that amount and interest. (Record pp. 445-525.)

Appellant's objection to this judgment is, first, that it was error to render any such judgment;

and, secondly, that, as it stands it may be claimed that it takes equal rank with appellant's judgment, unless it be awarded a lien.

However, if appellant's contention that the Bank was at all times the principal and the Building Company only its agent in the building transactions, all question as to the Bank's alleged claims against its own agent (i. e., itself) are obviated.

Facts of Ben Olson Company's Appeal

Ben Olson Company, a corporation, was one of some thirty lien defendants involved in this action, who claimed to have furnished material or labor, or both, in the construction of the bank building; and it is one of the appellants now before the court.

The statute providing for such liens is Sec. 1129 of Remington & Ballinger's Codes & Statutes of Washington, reading as follows:

> "Every person performing labor upon or furnishing material to be used in the construction, alteration or repair of any * * * building, * * * or any other structure, * * * has a lien upon the same for the labor performed or material furnished by each, respectively, whether performed or furnished at the instance of the owner of the property subject to the lien or his agent; and every contractor, sub-contractor, architect, builder or person having charge, of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter."

The statute in Sections following Sec. 1129, contains provisions usual in such statutes, relating to the land affected, priority over other encumbrances, the form and filing of lien claims, recording right of owners and contractors, foreclosure, rank of liens, etc., etc.

This appellant, was invited by Larson and Drury to bid for the material, labor and construction of the plumbing and heating systems of the proposed building, and on the 25th day of February, 1920, it submitted its bid, as follows: (Exhibit 251, Record p. 868):

Feb. 25, 1920.

Scandinavian American Building Company,
Tacoma, Wash.

Dear Sirs:

We propose to furnish and install the Plumbing and Heating Equipments in the New Building to be erected for the Scandinavian American Bank Building Co., Tacoma, Wash., for the sum of Ninety One Thousand ($91.000.00) Dollars.

This Bid is based on the plans and specifications prepared by Mr. Frederick Webber, Architect and Engineer, modified as follows:

Using enameled iron lavatories Plate B 440 in offices and Plate B 487 in the public toilets as specified.

Also including two house pumps as per specification.

Also including one sump pump.

If Bond is desired cost of same will be added to our bid.

This Bid is based on present freight rates, and in event of a raise in rates same will be

added to cost of all material not in transit.

Soil and Waste pipe to be assembled in pipe space above Bank. Size of waste and vent lines to be according to Tacoma Plumbing Ordinance.

Yours truly,
BEN OLSON CO.
By O. B. Olson, Pres.

It is understood and agreed that this Contractor allows $1,000.00 for the radiation that was in the old building, making our estimated price $90,000.00.

OK, O. B. O.

This bid was orally accepted, but the Building Company proposed a form of contract, which was objectionable because it contained a "waiver clause," Article XIV, as follows:

"Article XIV. And the contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all right to any mechanics' claim or lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract."

This appellant, (as did several other defendants) by its amended cross-complaint, pleaded facts constituting an avoidance of this provision, by reason of false representations made by the Company's agents to induce the execution of the contract proposed with the waiver clause (Cross-Complaint, Par. XXVII, Record p. 305); and the court below, upon the evidence, sustained the plea. (Decree, Par. XXXIII, Record p. 520).

The contract, dated February 27, 1920, leaving out matter not material here, was as follows, (Exhibit 252, Record p. 869):

"Whereas, the said Scandinavian American Building Company, Owner, is about to begin the erection of a sixteen story building on the property situated in Pierce County, Washington, described as follows: Lots Ten (10), Eleven (11) and Twelve (12) in Block One Thousand Three (1003) as shown and designated upon a certain plat entitled "Map of New Tacoma, W. T." of record in the office of the Auditor of Pierce County, Washington, according to plans and specifications prepared by Frederick Webber, of Philadelphia, Penn., architect, and

"WHEREAS, The said Ben Olson Co., of Tacoma, Washington, is desirous of entering into a contract with the said Scandinavian American Building Company, owner, to furnish all plumbing and heating, as per estimate of February 21, 1920, hereto attached, under and subject to all terms, limitations and conditions contained in the plans and specifications hereinbefore referred to.

"Now this Agreement Witnesseth,

"ART. I. That in consideration of the agreements herein contained, the Owner agrees to pay to the Contractor, the sum of Ninety Thousand and no/100 ($90,000.00) Dollars, in installments as hereinafter stated. Said payments, however, in no way lessening the total and final responsibility of the Contractor. No payment shall be construed or considered as an acceptance of any defective work or improper material.

"Although it is distinctly understood and

agreed by and between the parties hereto that this contract is a whole contract, and not severable or divisible, yet for the convenience of the Contractor, it is stipulated that payments shall be made as follows:

"75% monthly, to be paid in cash, of the estimated value of work delivered and also of work erected in place, and the balance of 25% to be paid within thirty (30) to sixty (60) days from the completion and acceptance of work by the architect.

"ART. II. The said Contractor hereby covenants, promises and agrees to do all of the aforesaid work to be furnished and finished agreeably to the satisfaction, approval and acceptance of the Architect of said building and to the satisfaction, approval and acceptance of the said Owner, according to the true intent and meaning of the drawings, plans and specifications made by said Architect, which said plans, drawings and specifications are to be considered as part and parcel of this agreement, as fully as if they were at length herein set forth, and the said Contractor is to include and do all necessary work under his contract, not particularly specified, but required to be furnished and done in order to fully complete and fulfill his contract to the satisfaction of the said Architect and Owner aforesaid.

"ART. III. The Contractor hereby agrees that time shall be considered the very essence of this contract and to complete all the obligations herein assumed, and to enter into the spirit of co-operation under which all the Contractors are working. And the said Contractor further covenants and agrees to perform the work promptly, without notice on the part of any one, so as to complete the building at the earliest possible moment.

"ART. IV. The Contractor further covenants and agrees to observe carefully the progress of the work upon the entire building, without notice from any one, and to procure drawings at least two weeks prior to executing the work, and to perform his portion of the work upon said building at the earliest proper time for such work, and to be responsible for all loss occasioned directly and indirectly by any lack of knowledge upon his part, as to the proper time to perform his work.

"ART. V. The said Contractor shall complete the several portions and the whole of the work comprehended under this agreement by and at the time or times hereinafter stated, viz.:

"Contractor to follow erection of steel work with all main lines for plumbing and heating and to buy, if necessary, piping in the open market in order to keep up with the steel work, so that the whole of said work can be completed within ten (10) months from the date of this contract.

"It is also understood and agreed that the radiators from the old building are to belong to the contractor."

The remainder of the form used was a series of stringent time provisions holding the contractor to strict promptness in the performance of its work, under penalty of $50.00 per day.

Instead of the work being rushed to a completion in ten months, as the contract contemplated, it was so delayed, that appellant was barely able to commence construction at the end of that

time. In preparation, however, to keep up with the demand upon it, appellant procured and assembled certain materials, by July 1, 1920, on the Lots, which with the labor in connection therewith, were of the approved value of $8,541.03. (Exhibit 253, Record p. 875, and Testimony of Olson Record p. 875; and Herber, Record p. 910), and 75% of that sum, with the approval of the Architect's representative, Mr. Wells, was paid, July, 1920.

Likewise, by August 30th, another estimate of material and labor brought on the premises, amounting to $7,972.83, was accepted, and 75% was paid September 25, 1920, (Exhibit 256, Record p. 880).

And a third estimate was presented, January 4, 1921, for $19,050.90, and approved by Mr. Wells, but payment was postponed and not made, because of the failure of the Bank, January 15th. (Exhibit 257, and Olson Record p. 881, and Herber Record p. 257-912).

On the same day that the Bank failed a fourth estimate, amounting to $1,001.43 was presented, but there was no approval, because the entire project was abandoned. (Exhibit 258).

All of the items of materials detailed in the four estimates were deposited on the Lots, excepting certain ones which will be referred to at this point. Some were actually installed in the building.

The materials scheduled were of three classes, viz.:

1. Such as were procured from dealers, and deposited on the premises;

2. Such as were procured from dealers, and, for want of room on the premises, and danger of injury if left on the premises, were stored in appellant's warehouse with approval of ~~Glenn~~ Wells; and

3. Such as were taken out of appellant's stock and placed on the premises, ready for use.

Some of the materials deposited on the premises were procured from Crane Company, and had not been paid for by appellant. Appellant's Cross-Complaint referred to this fact, and disclaimed any recovery for such materials as might be sued for by Crane Company.

Soon after the abandonment of the work, appellant applied to the court for leave to withdraw its unused materials on the premises, in order to reduce the lien as far as possible, and an order was entered allowing the withdrawal of such of those materials as could not be covered by any lien of other parties, amounting to $4,907.52, in value. These were included in Estimates 3 and 4 (Exhibits 257 and 258, Record pp. 881 and 883), and included the following items.

From Estimate 3:

Dec. 3. Galv. Drainage Fittings from B. O. Stock ..... $ 540.50
Malleable Galvanized Fittings 1,864.74
Galvanized Nipples (only) 557.40
Cast Iron Steam Fittings 969.26
1 42x120 Hot Water Generator with steam coil 650.00

From Estimate 4:

Jan.	16 ft. 3″ 4 ply Rubber Belting.....	5.92
	12 3″ Plugs— .50	6.00
	128 4″ Plugs— .82	104.85
	25 1¼″ Plugs— .10	2.50
	4 2″ Plugs— .15	.60
	12 1½″ Plugs— .35	4.20
	12 1½″ Plugs— .10	1.20
	4 1½″ Plugs—2.40	9.60
	65 1″½ Caps	
	25 ¾″ Caps	
	25 1″ Caps	40.75
	1 3″ Expansion Joint	
	1 8″ Expansion Joint	150.00
	Total	$4,907.52

The lien claim filed and asserted by appellant does not include any of the foregoing items reclaimed under the Court's order. The Court refused to allow any of the materials procured from Crane Company and not paid for to be removed.

The items which could not be received or stored on the premises and which are claimed for by this appellant, were such as had been procured for this particular building, and became of little worth when the project was given up. These items were all included in Estimate 3. (Exhibit 257, Record p. 881), and were accepted as delivered by the architect's representative, as appears on the

face of the Exhibit; he agreed that they should be stored in appellant's warehouse, because there was no place for them on the premises. (Herber Record pp. 912-13, and Olson Record pp. 882-3).

These items were as follows:

The following items at Ben Olson Company Shop:

2 House Pumps	$1,134.00
1 Sump Pump	474.00
17 Sets of Hose Racks	1,542.00
Valves for Branches	265.00
Steam Radiator Valve and Main Steam Trap	2,460.00
Total	$5,875.60

And there were also stored at the same place, under the same circumstances, but not certified on any estimate, though noted on Estimate 6, to be mentioned hereafter: "375 Vacuum Valves for Radiation @ $6.00, $2,250.00", and these, also, are claimed for.

Again, on Estimate 3, there was an item of "86 Hurlbut Fittings, $1,720.00." Crane Company furnished 86 toilet closets and fixtures complete, made to order, and brought from the factory to Tacoma ready for use.

The building contract price of these closets was $7,852.66.

The 86 Hurlbut Fittings were a necessary fixture going with the 86 closets; but the fittings had to be on hand in the building, because they went

into the walls, at the stage of construction called "Roughing In." They were of cast iron; in no danger of damage from exposure, and were included in Estimate 3, at an estimated value of $1720. (Ex. 3, Record p. 881; Olson p. 897).

But the closets themselves, being made of porcelain and polished wood, could not go on to the premises in the condition they were in, because of danger of breakage and weather damage, so they were stored in Crane Company's warehouse, about two city blocks from the building.

These 86 closets were scheduled on Estimate 5 (Ex. 262, Record p. 898), at a value of $6,132.66, and were claimed for.

Lastly, Crane Company, upon the order of Appellant, and to fulfill its contract for plumbing construction, procured to be manufactured specially for this building, the following:

33 Porcelain Urinals, etc. (contract value)	$2,676.30
24 Enameled Lavatories (contract value)	1,168.80
238 Enameled Lavatories (contract value)	8,275.26
16 Slop Sinks (contract value)	790.40
Total	$12,910.76

These articles are itemized in Estimate 6 (Ex. 263, Record p. 900); they were brought to Tacoma ready for use, were billed to appellant by Crane Company, and because of their fragile character, were stored by Crane Company, neither the building nor appellant having proper storage space.

There was no dispute, or attempted contradiction of appellant's witnesses as to the facts, excepting that appellant's contention that the closets and the lavatories were made specially, and were not adapted to any other building, and hence would be of little value unless used there, was disputed, especially by the Complainant McClintic-Marshall Company, it being contended that they were merely made up from factory stock, as catalogued by Crane Company. This effort of the opposition was not supported by any witnesses of its own, but solely by cross-examination of appellant's and Crane Company's witnesses. We may well submit this point on the testimony of Messrs. Olson, Record pp. 897-907; Herber, Record pp. 920-929; Downie, Record pp. 943, 951.

But the Court did not pass upon this question at all, any reference to it being obviated by its ruling upon the question of delivery.

Therefore appellant presented an account as follows:

Of Materials delivered on premises:	
Estimate 1	$ 8,378.03
Estimate 2	7,764.83
Estimate 3	7,814.40
Estimate 4	675.81
Total	$24,633.07
Of Materials in its own Warehouse:	
Estimate 3	5,875.00
Godfrey Valves	2,250.00
Total	$ 8,125.60

Of Materials in Crane Company's Warehouse:	
Estimate 5. (Remainder)	6,132.66
Estimate 6	12,910.76
Total	$19,043.42
Labor:	
Estimate 1	163.00
Estimate 2	208.00
Estimate 3	779.00
Estimate 4	1,129.80
Total	$ 2,279.80
Grand Total	$54,081.89

The Building Company had paid on account $13,425.56, including $1000 for old radiation and recovery and a lien was asked for the balance of $41,656.33.

It was further alleged and shown that to have completed the work contracted for, appellant would have had to furnish materials of the contract values of $16,691.64, and labor at the expense of $11,-196.70, (Herber Record pp. 915-921). These amounts added to the $54,081.89 furnished would have totalled $81,970.23, leaving the difference between that amount and $91,000.00, the contract price, viz.: $9,029.77, as nominal profit on the job, the contractor bearing all of his overhead expense; and for this sum a judgment was asked, but without a lien.

The lien prayed for was $41,656.33, less whatever sum should be awarded to Crane Company, as a sub-contracting material man, which turned out to be $16,047.03, (Decree Par. 17, Record p. 502.)

The Court below, however, by its rulings:

1. Held that no lien could be had for any materials not actually delivered upon the premises, or used in the structure, rejected as non-lienable.

(a)	The materials stored in appellant's warehouse	$ 8,125.60
(b)	The Closets (Estimate 5)	6,132.66
(c)	The Urinals, etc. (Estimate 6)	12,910.76
	Total	$27,169.02

2. Held that for the materials listed in Estimates 1, 2, 3 and 4, at $24,633.07, appellant was entitled to only the cost of the same, as purchased from Crane Company, viz., $16,047.03, plus 15 per cent or $18,454.08.

3. Entirely omitted to consider the item of $2,279.80 for labor actually performed by appellant. (Herber Record p. 967).

4. Entirely omitted consideration that materials of the value of $1,173.99, which were not procured from Crane Company, were installed in the Building, (Herber Record p. 965, and Ex. 357).

5. Held that by reason of excessive valuation of materials procured from Crane Company, appellant should be allowed no lien for anything and no attorney's fee. (Decree Par. XXVI, Record p. 514.)

6. Awarded appellant a general judgment against Scandinavian American Building Company,

for $13,407.43, but refused to extend the judgment as against the Scandinavian American Bank.

First Error

That a material man or contractor can have a lien for such materials, only, as have been delivered on the premises.

The federal courts very seldom have to pass upon these mechanics' lien cases; and when they do come up, the statute of the particular state, is the measure of authority and the arbiter of decision, the interpretation of the State's appellate Court on a point decided, being of binding force.

Several of the apepllants in this action are interested in this point of "delivery", and doubtless, other and more effective arguments will be made by them in contesting the position of the court below.

The contention of this appellant is, that under the law of Washington, as clearly interpreted by its Supreme Court, Ben Olson Company was entitled to a contractor's lien not only for the materials it brought upon the premises, but also for those which it was compelled, by the sharp terms of its contract as to time of performance, to procure and have on hand ready for installation as soon as the building was ready for them.

When the contractor was bound, by Articles III

and V, (Anti. p.17.), to have its work done within ten months, there was an implied agreement on the other side that it should be given the opportunity to do it within that time. But that agreement was disastrously broken, not of course, entirely by the fault of the owner, but, nevertheless, broken so as to put the contractor in the position of having, on the faith of the owner's promise to have things ready for it, procured some thousands of dollars worth of now practically worthless goods, and of having to place them in warehouse, as near the premises of the owner as practicable, because the premises themselves were unable to receive them; and that too, when the owner's agent, Wells, particularly assented to the storage, and in the case of Estimate 3, noted on its face items to the value of $5,875.60, as at Ben Olson Company Shop, and accepted them as a basis for payment on account.

Why in the name of reason should not a contractor have a right to a lien under such circumstances, as well for such materials, as for those which he was fortunate enough to be able to lay upon the Lots, or in the streets about them?

We take it that a contractor who undertakes to procure, furnish and put materials in place is in no different position from one who agrees to manufacture, furnish and put in place. Each having done his part, becomes entitled to a lien

when the owner abandons the improvement. and violates his contract.

At the hearing of appellant's case, Mr. Olson was asked about materials not taken to the Building (Record p. 896); whereupon counsel for the Bank and Building Company objected on the ground that "he is not entitled to a lien for materials not delivered"; to which the Court replied:

> "Well, if delivery, either actual or constructive, has been waived, another rule might apply, and I cannot tell until I hear the testimony."

We claim that the evidence established waiver as to materials at the shop, and, those covered by Estimate 5, at least, and that the "other rule" should have been applied.

But all question as to "delivery" and "deposit" of materials has been obviated by the Supreme Court of Washington, in *Western Hardware & M. Co. vs. Maryland Casualty Co.*, 105 Wash. 54.

There there was a contractor for a heating and ventilating plant in a schoolhouse, which involved sheet metal work.

The contractor sublet the furnishing and installation of the sheet metal work of the heating plant to one Zimmerer, who had a shop in Seattle.

Zimmerer then bought his sheet metal from the Western Hardware & Metal Company, on the credit

of the building, and the Western Company delivered the metal to Zimmerer's shop.

The entire bill for sheet metal was $766.93, but only $140.00 worth of it actually went into the building; Zimmerer became bankrupt and the remainder of the metal was disposed of elsewhere; or, at any rate it never reached the premises.

A lien claim was sustained for the entire amount.

Too much space would be required to state the argument of the Court, but, beginning with a reference to, and affirmance of the case of *Huttig Bros. Co. vs. Denny Hotel Co.*, 6 Wash. 122, the Court declared in favor of what is known as the Pennsylvania theory which is that the word "*furnish*", as used in the statute, means "provided for in good faith", without consideration of the actual place of temporary deposit of materials; and it then went on to cite numerous and convincing cases from other courts, pausing to eliminate *Liscomb vs. Exchange National Bank*, 80 Wash. 206, and some other Washington cases which were offered as opposing the construction it adopted.

It may be well to refer to some of the cases cited in 105 Wash. 54.

Burger vs. Turnblad, (Minn.) 107 N. W. 543, was based upon facts as follows: The plaintiff was the son of the contractor, and was employed

by his father to work on ornamental plaster casts for the decoration of the plaintiff's house, at 55 cents per hour, the work being done at his father's shop. His entire bill was for $680.05. Of his work only $148.50 worth was put in place in the house. The owner and his father then had a disagreement, and his father, without any justifiable cause, refused to go on with his contract or to allow any of the finished casts to be used in the house, or to deliver them to the owner; and it was held that not only was the plaintiff entitled to his lien, although his work was away from the building, but that his father's arbitrary action did not defeat it.

In *Howes vs. Reliance Wire Works Co.*, (Minn.) 48 N. W. 448, a wire elevator inclosure for a new building was contracted for, and the contractor went on and constructed the inclosure at its shop; but before it could be installed, the owner sold the premises, and the purchaser refused to allow it to be installed, which was the case here.

The opinion, at one place observes:

> "If he (the contractor), *had brought any part of the materials on the premises*, and the sale had taken place while the work was in progress, he could not have been deprived of his right to a lien upon the completion of the job in the building."

And after speaking of the preparation of material at a yard in shop:

"Such work of preparation should be deemed part of the construction or "*furnishing*" under the contract."

And again:

"It is true that the lien law is based on the theory of the increased value of premises, caused by the work or materials furnished, but, where the work is interrupted or materials diverted through the fault or act of the owner, obviously, the rule cannot be applied technically."

Burns vs. Sevelle, (Minn.) 51 N. W. 224, stated a definition, thus:

"In the ordinary understanding of the terms "*furnish for the erection of*", the furnishing the materials is complete when it is sold and delivered for the purpose of the erection."

Another of the cases cited in 105 Wash. is *Trammell vs. Mount*, (Texas), 4 S. W. 377, and the opinion in that case states the rule in cases like this one, namely, when the contractor has been prevented from placing in the building a part of his material prepared at a distance from the premises.

The opinion says:

"If he (the owner), directs, for his own convenience, the material be delivered at some other place, or *after it is prepared, and nothing is left to be done by the material men but to take it to the building spot*, the owner violates his contract and refuses to receive it, it seems that

justice dictates that through his own conduct the owner should not defeat the lien."

The case was a contest between creditors of the owner, who had levied an execution on the building premises and the contractor, over the question whether the lien of the latter for materials still at his shop was sustainable prior to the execution levy, which the court answered in the affirmative, saying:

"This ruling leaves the ownership of the stone in Lawson, Smith & Co. the owners, and leaves it subject to their debts."

Appellees will, doubtless, resort to decisions from the Courts of other states which furnish authority *in those states*, for the strict delivery doctrine adopted by the court below; but in the presence of the rule established in Washington, by its Supreme Court, they can have no effect as precedent, in this case. In *Western H. & M. Co. vs. Maryland Casualty Co.*, Supra, at p. 62, the Supreme Court of Washington observed:

"Of course where a statute, by its terms, gives a lien right only for material actually going into and becoming a part of the structure, as some of them do, such a condition is necessary to support a claim of lien thereunder; but such are not the terms of our lien or bond statute."

But appellees will also cite, with appearance, at least, of confidence the case of *Holly-Mason & Co.*

vs. National Surety Co., 107 Wash. 74, as a later decision of the Washington Supreme Court, which impliedly, was a ruling contrary to *Western* H. & *M. Co. vs. Maryland Casualty Co.*, in 105 Wash.

Now the latter case was decided January 9, 1919, by the unanimous opinion of Main. C. J. and Judges Parker, Mount, Holcomb and Fullerton. The case was reargued before the Court *en banc* (nine judges), and on May 31, 1919, the original opinion was adhered to.

In the meantime, and on May 14, 1919, the Holly-Mason case was decided, by the same five judges, and there was no rehearing.

So far as time goes, therefore, the final decision in the Western Hardware case was the later; and besides it had the approval of the entire bench.

But the two cases did not conflict, either in law or facts. In the Western Hardware case, the materials were delivered to the sub-contractor, Zimmerer, at his shop, there to be fabricated for placement in the building; the sub-contractor is, by the statute, Sec. 1129 (quoted ante. p./3.), made the agent of the owner for lien purposes; and the material man, in that case was held entitled to its lien.

But in the Holly-Mason Case, the difficulty was that the goods, miscellaneous hardware, was not traced either into the hands of the contractor, or

to the premises, and the substance of the decision was that to sustain a lien in such a case of the mere sale of such materials to a contractor, without a showing that the goods were used in, or came to the building, for use therein, would open the way to "the grossest frauds", because the owner might be subjected to liability for many times the materials used or necessary for his building, if the loose method of delivery employed in that case were supported as the basis of declaring a lien.

Here, however, the Court has a case where no such questions arise. Technically a contractor for materials and construction does not "deliver" anything except as he constructs. His materials are always in his possession, and unless they are subject to the lien claim of his vendor, he can remove them and substitute others, if he has them on the ground; even if he violates his contract and refuses to perform it, the owner has no claim upon them unless he has paid, or partly paid for them. This was the very ground upon which the Court below made its order allowing Ben Olson Company to withdraw some of the materials listed in Estimates 3 and 4, from the building.

But such a contractor is not bound to retain materials procured according to the specifications for the building, and accept the great loss which would naturally follow the retention of a lot of specialties, because the owner sees fit to quit the enterprise. And, again, the Court below recognized

this principle, in giving appellant judgment against the Building Company for some thirteen thousand dollars, over and above the award to Crane Company, which included some of the stored materials.

It is therefore submitted that on the question of delivery on the premises, the decision of the Court below as to this appellant was erroneous.

This error corrected would bring in for disposition the machinery and materials at Ben Olson Company's shop or warehouse:

	$ 8,125.60
Items in Estimate 5 (at Crane Co.'s)	6,132.06
Items in Estimate 6 (at Crane Co.'s)	12,910.76
Total	$27,168.42

Second Error

It was error to hold that appellant was limited, in claiming a lien for materials purchased from Crane Company, to the prices charged by the seller, and fifteen per cent.

The proof in this case was (uncontradicted) that when Ben Olson Company made its bid for the plumbing and heating, at $91,000, it was based on careful listing of items required by the specifications. (Olson Record p. 888). Mr. Herber had in Court the book of estimates used and testified from it as to value of items required to complete the contract. Record p. 915).

Olson and Herbert also testified that when each Estimate, 1, 2 and 3, was submitted, Mr. Wells, the Building Company and the architect's representative, checked them over, and, finding them correct, in items and value, approved them, and certified the totals for payment. (Exhibits 253, 255, 257, Record pp. 876- 879-882). In other words, they were found to agree with the contract. This fixed the value as between the owner and the contractor. No one, and especially no other claimant, could dispute them; and still more, especially, no claimant whose rank as a lien holder was superior —laborer, materialman or sub-contractor—could do so. No party of the same rank undertook to do so, unless it be the Scandinavian American Bank which, as we shall hereafter show, was the real owner and liable for the debt.

There was no suggestion of overreaching or unconscionableness in the transaction.

If the job had gone on to completion there can be no question that appellant would have been entitled to judgment for the unpaid part of the full contract price, and its lien therefor. But the work was not completed, solely through the failure of the owner, and the contractor is forced to lose the benefit of his contract, and recover what the law allows him in such cases, and for such recovery he is entitled to his lien.

What does he recover?

To digress a moment.

It will be contended, as it was below, that this is a suit upon the contract; but it is not so. This is an action to enforce a purely statutory lien right, and the remedy is compensation to the innocent contractor for what he has done or finished *at the contract price.* He has three courses open to him: 1. He may rescind the entire contract, and maintain an action at law for the breach; or, 2. He may declare upon a quantum meruit for the value of the labor, and materials furnished; or, 3. He may avail himself of the remedy provided for the enforcement of a mechanic's lien, to recover for the value of the labor and materials furnished.

Girouard vs. Jasper, (Mass.), 318; 106 Northeastern 849.

The first two are actions at law; the third is a proceeding *in rem,* as a suit in equity.

27 Cyc. p. 322.

The contract in this proceeding cuts no figure, except that it furnishes evidence of the work to be done and the price of it.

And now returning to the question: What is the measure of the contractor's recovery? We need not go outside the Washington Supreme Court reports. What he recovers is neither damages nor *quantum meruit,* or any other technical thing; but "*such amount as may be due him under the terms*

of his contract". Rem. & Bal. Sec. 1130.

Noyes vs. Pugin, 2 Wash. 653, is the pioneer case in Washington, decided in 1891, but *Chase vs. Smith*, 35 Wash. 631, is oftener referred to, as the authority on the subject of the measure of recovery by a contractor where the owner stops the work.

The contractor undertook to paint a number of houses for $1,210.00, payable as the work progressed. After a few days' work had been done, the owner refused to let him proceed, and let another contract to another painter. The gist of the dicision as affecting the point we are discussing, was that the contractor was entitled to the value of the work done *at the contract* rate. (p. 634).

Chase vs. Smith, after being followed in many cases reported in the Washington decisions, for eighteen years, was brought up again for review in the case of *Davis vs. Thurston County*, decided April 5, 1922, and reported in 19 Washington Decisions (Pamphlet), 265; it will appear in 119 Washington Reports, at the same page. The occasion of the review was that, inadvertently, in *Anderson vs. Hilker*, 38 Wash. 632, a charge to the jury that the contractor was entitled to his *expenditures, in part performance*, was in accord with *Chase vs. Smith.*

The Supreme Court, now, in *Davis vs. Thurston County*, goes over the whole subject elaborately, overrules the Anderson case, and firmly restates the

proper rule, viz., that the value of the work done, *at the contract rate*, is the measure of the contractor's recovery.

And the principle was affirmed, September 8, 1922, in *Bailey vs. Furleigh*, 21 Washington Decisions (Pamphlet), 107, to appear in 121 Wash. 107.

We cite, also, 17 Corpus Juris, p. 858, Note 49, reading:

> "Where performance, under the contract has advanced to a point where it may be determined from the contract what payment plaintiff is entitled to, for the work already done, his measure of recovery is properly the contract price for the part of the contract which has been performed, together with the profits which he has lost from being prevented from performing the remainder of the contract."

6 Ruling Case Law p. 1032, citing, *Gabrielson vs. Hague Box Co.*, 55 Wash. 342-6.

In *Gould vs. McComick*, 75 Wash. 61, where the work was stopped by the owner, and where the contract price was $16,250, $8,000 had been paid, and the evidence was that it would cost $1,500 to finish the job, the Judgment was for $6,500; attorneys fee of $1,500; and foreclosure of a lien for both items.

In *Burroughs vs. Joint School District No. 2*, 155 Wis. 426; 144 Northwestern 977, where a contract provided that 90% of the *value* of construction

should be paid each month, it was held that "value" as there used, meant contract value or the value which a named amount of construction bore to the contract price, and not the *market* value of the construction and materials in question.

The phrase used in the Olson Company contract is "Estimated value", which was the value approved by Mr. Wells in Estimates 1, 2 and 3, and should apply to the others.

See for general discussion, Sutherland on Damages, Sec. 713, (p. 2687 et seq.).

Now, Crane Company presented a claim as a sub-contracting materialman for items furnished to Ben Olson Company ,including those in Estimate 5, amounting to $20,416.80, which included the items contained in Estimate 5. Rejecting the Estimate 5 items, on account of non-delivery, the Court below awarded Crane Company a judgment and lien for $16,047.03, for the delivered items. (Opinion, Record pp. 453-7); and thereupon, finding that Ben Olson Company claimed the contract price for the same articles, (Estimates 1, 2, 3 and 4), $23,459.08, held that in could have no more than the Crane Company's selling price, plus fifteen per cent, which it designated as profit, because the claim represented an "unconscionable" profit, especially as the goods had not been paid for. (Record p. 469.)

It was not the fault of appellant that the Crane

Company goods were not substantially paid for; for had the Building Company made the 75% payment on Estimate 3, which was $19,050.90, the $14,288.17 due January 4th, would have been paid over on the Crane Company account, which was only $15,786.00 (Record p. 956), leaving the balance only $1497.83.

Technically, by the way, it is true that these goods had not been paid for, but in fact all the money Ben Olson Company had received on its contract was paid over to Crane Company, but because Ben Olson Company had not thought to direct its application to the payment of these particular bills, Crane Company applied it on the general account it had with Ben Olson Company. It did, however, charge all of its deliveries on account of this job to Ben Olson Company and held it for full payment, (Record pp. 955-6).

Under the cases of *Chase vs. Smith*, and *Davis vs. Thurston County*, *supra*, the contractor prevented from completing his work is entitled to the contract price for what he has done, including cost of labor and materials, expenses of all kinds attaching to actual operations, his overhead, and his profit. And all those matters went into the $23,459.08, claimed in this case. The overhead, alone, in such work is from 25 to 33 per cent; and in one instance, in this case, that of the claim of the Puget Sound Iron & Steel Works the record of which has been brought here (Record p. 969), the Court allowed a

claim when the excess over cost was 125 per cent, on account of overhead, (Decree, Record Par. X, p. 495). But in that case the claimant had the advantage which came from the cross-examination of its witnesses, whereas, in ours, there was no cross-examination, and no attempt to show excessive charges. The point was made by the Court itself.

The Court's opinion suggested that the overcharge was unconscionable, "at least so far as other claimants are concerned." (Record p. 469).

But no other claimants are interested in the matter, because they are all either laborers or material men, and therefore superior in rank. But if they were not, what difference would it make? Although at the bottom of the list in rank, appellant would not have been heard to question whether the complainant, McClintic-Marshall Company, charged an unconscionable price for its steel, or whether the Far West Clay Company got too much for its tile. Both had contracts, and recovered the contract price, without question; and there was no reason why they should be allowed to interfere with appellant's contract.

It is to be remembered that appellant was the low bidder, and that the Building Company had an architect all the way from Philadelphia to supervise the letting; so there could hardly be any question of overreaching; and there was no evidence of it except the figures, no explanation of which was

called for, either directly, or by the practice in the other cases, all of which were heard before this one.

Appellant contends, therefore, that there should have been allowed to it the difference between the contract price at which it was to furnish the Crane Company materials which were delivered at the building, $23,459.08, and the award to Crane Company, $16,047.03, viz: $7,412.05, and that it should have had a lien therefor. And of course, if either or both of the items contained in Estimates 5 and 6 be allowed, they would be added to the above, viz: $6,132.66, in one case and $12,910.76, in the other.

Third Error

Omitted Materials and Labor

The hearing of this case was drawn out through several months, proceeding intermittently as the Court could get a day or two, now and then, from other pressing business, and it is not surprising that some things were overlooked. After the decision was handed down the court was too weary of the whole matter to attempt corrections.

There were two such omissions in appellant's case.

In the first place, the court assumed that all of the items contained in Estimates 1, 2, 3 and 4, which were not withdrawn under its order, or which were not stored at appellant's shop, had been procured from Crane Company. But it was shown, by permission of the Court after the decision, by Mr. Herber (Record p. 965), that appellant had actually installed in the building materials of its own, not obtained from Crane Company, of the value of $1,173.99. There could be no question of the lienability of these items.

The second omission was the labor which the proof showed was actually performed, and the most of which was certified to by Mr. Wells. No note at all was taken of this item which amounted to $2,279.80, (Record p. 967); and of this amount, also, there could be no question of lienability.

These amounts add $3,453.79 to those heretofore claimed.

Summary of Appellant's Proper Demand Under Errors 1, 2 and 3

Estimate 1, Materials (delivered)		$ 8,378.03
Estimate 2, Materials (delivered)		7,764.83
Estimate 3, Materials (delivered)		7,814.40
Estimate 4, Materials (delivered)		675.81
		$24,633.07
Estimate 3, Materials (B. O. Co. Warehouse)	$5,875.60	
Godfrey Valves	2,250.00	8,125.60
		32,788.67

Estimate 5, (Remainder) in Crane Co. Warehouse		6,132.66
		38,921.33
Estimate 6, in Crane Co. Warehouse		12,910.76
		$51,832.06
Omitted Installed Material	$1,173.99	
Omitted Labor	2,279.80	3,453.79
		$55,285.85
Less Allowance to Crane Co.	$16,047.03	
Less Paid by Building Co.	12,425.56	28,472.59
Judgment and Lien should be for		$26,813.26

In addition to the above the evidence showed (Record p. 915), that with the expenditure of $16,-691.74 for additional materials and $11,196.70 for labor, viz: $27,898.64, appellant would have completed its work ,at a total cost of $83,184.29, which was $6,815.71 less than the Contract price, for which it was entitled to a judgment without lien.

Appellant's judgment, however, was for only $13,407.43, and interest, with no lien and no attorneys' fee.

Fourth Error

The Court erred in refusing to allow appellant a reasonable attorney's fee.

The statute (Rem. & Bal. Sec. 1141) permits the Court to allow a reasonable attorney's fee to the successful lien claimant; and the Court below, in this case did allow attorney's fees of foreclosure

to each of the other claimants. But having denied appellant any lien at all, though rendering judgment in its favor generally for $13,407.43, it, perhaps consistently refused any attorney's fee, also.

We have previously presented the point that it was error to refuse a lien, for the amount for which appellant was awarded judgment; and we assume that if our contention on that point is sustained, the allowance of an attorney's fee would follow, as matter of course, such fee being based, as were the others, on appellant's entire lien as fixed on this appeal. As may be seen from the decree, the fees allowed the other claimants, for like amount averaged about ten per cent.

Fifth Error

The Court below erred in refusing to hold that the Scandinavian-American Bank and the Scandinavian American Building Company were identical corporations, and that the Bank was liable for the obligations created in the name of the Building Company.

The Bank, a Washington corporation, was controlled by the Act of March 10, 1917 (Session Laws 1917, Chapter 80, p. 271), had its place of business in a six story brick building which it acquired in 19.., located on Lots 11 and 12, Block 1003, in the City of Tacoma. Early in 1919, its officials determined to remove the old building and construct

a new and larger one on the same ground, with Lot 10 added, (Larson Record p. 1040). Lot 10 belonged to one of its Directors, Charles Drury, doing business as "Drury, the Tailor". The Bank procured the enlargement of its capital to $1,000,-000., and then set about the work of financing and constructing its new building. A Philadelphia architect named Webber was retained to prepare the plans, and the President and other managing officers visited New York and other eastern cities seeking opportunity to borrow money. It was assumed by all the persons acting in the matter that when the time came for effective action, there would be no difficulty about procuring the Drury Lot or having the formal action of the Bank's Directors, or any other thing necessary to the project.

It was not the desire of the Bank, however, that it should, itself, execute the instruments required in the financial operations, or that it should appear to the public as so heavily interested in real estate. Therefore, although no such corporation had then been organized, it conducted its negotiations for its building loan, in the name of "The Building Company" or "The Scandinavian American Building Company", and about September, 1919, procured from the Metropolitan Life Insurance Company of New York a tentative commitment to a loan of $600,000 to pay the completion cost of a building to cost $1,080,000, according to the plans prepared by Webber. But before proceeding further, the screen behind which it was intended that

the Bank should stand for purposes of avoiding liability and public criticism, was set up in the form of the "Scandinavian American Building Company", a corporation provided with a paper capital of $200,000.00.

Under the Laws of Washington providing for the incorporation of business corporations (2 Remington & Ballinger's Codes and Statutes, Sec. 3679) the first step is the filing of Articles of Incorporation with the Secretary of State and the County Auditor, which Articles must be executed by two or more persons. In this, the President of the Bank, and one of its Directors officiated. Another requirement of the statute is that the Articles of Incorporation must fix the number and name the trustees who shall "manage the concerns" of the company for not less than two nor more than six month. Articles of Incorporation of the "Scandinavian American Building Company" capital $200,000.00 were executed by J. E. Chilberg, President and Gustav Lindberg, a Director of the Bank on the 18th day of November, 1919, (Ex. 179, Record p. 985) and filed in the office of the Secretary of State on the 21st day of the same month; but they were not filed in the office of the County Auditor until February 26th, 1920. (Ex. 179, Record p. 987).

Section 3683 of the Statute, provided that when the certificate shall have been filed the persons who

signed and acknowledged the same, and their successors shall be a body corporate. The certificate and filing refer to the Articles of Incorporation and the filing in the offices of the Secretary of State and County Auditor. So there was no Scandinavian American Building Company, de facto, until February 26th, 1920.

The Articles of Incorporation provided for a board of seven trustees, viz: J. E. Chilberg, O. S. Larson, Jafet Lindeberg, Gustaf Lindberg, Charles Drury, James R. Thompson and George G. Williamson, (Record p. 987); and these same persons constituted the Bank's directorate. The last statement has been denied by the Bank representatives and perhaps will be denied again; but it is true nevertheless; Bank Minutes of November 25, 1919, (Record pp. 1147 and 933, Ex. 271), and January 17, 1919; (p. 369½, Exhibit 183, Larson, Record p. 1042). Ernest Lister died in 1919 and was replaced by O. S. Larson (Bank Minutes Nov. 18, 1919, p. 401, Ex. 183, Record p. .....) Three new men, Lamborn, Sheldon and Johnson, succeeded Chilberg, Lindeberg and Thompson, at the annual Bank election in January 1920, (Ex. 183, Record p. ....)

The organization of the Scandinavian American Building Company took place November 25, 1919; apparently present, Lindberg, Lindeberg, Drury, Williamson and Larson; absent Chilberg

and Thompson. (Building Co. Minutes, Ex. 178, Record pp.1256-7).

The statute required that the capital stock of the corporation be fully subscribed before it could commence business, and that matter was the first thing attended to by the trustees, Chilberg and Thompson being absent. Both of these at the trial disclaimed having known that they were named trustees. The stock was subscribed as follows:

O. S. Larson, 1996 Shares	$199,600.00
Gustav Lindberg 1 Share	100.00
Jafet Lindeberg 1 Share	100.00
Charles Drury 1 Share	100.00
George G. Williamson 1 Share	100.00
Total 2,000 shares	$200,000.00

(Building Co. Minutes, Ex. 178, p. 17; Record p. 1256.)

This was all the business transacted at the organization meeting, and that was probably the only meeting the Board ever held. There is a sheet of purported Minutes of a meeting held August .., 1920, where four members were represented as present, viz: ..... ,....., Williamson and Thompson; but Williamson could not remember any such meeting (Record p. 989), and Thompson entirely repudiated it (Record pp. 1148-1150). Sheldon, who signed the Minutes as Secretary, did not attend and rather thought somebody gave him the form unsigned (Record pp. 1154-5). Neither of the other two trustees was asked

about it. However the substance of the Minutes was that one Simpson, was authorized to borrow $1,350,000, for the corporation, wherever he could. He never did anything in that matter.

Larson testified that his subscription to the Building Company's capital stock, was not for his own account, but on behalf of the Bank, so that it might control the Building Company, and the building after it was constructed (Record pp. 1040-2; 1092-3; 1096-7; 1106-7). He became president of the Bank, in January, 1920, and was always its manager. Drury was made President of the Building Company and was Chairman of the Bank's Board of Directors. These two men, without the specific authority or direction of the Bank or the Building Company carried on all of the subsequent operations which resulted in the partial erection of the proposed building, and the accumulation of the indebtedness which caused its abandonment, January 15, 1921.

In the meantime the following things happened:

1. Nov. 25th, 1919, the Bank's Directors voted a loan to the Building Company of $15,000.00, to be secured by Lot 10, (Record p. 933).

2. February 5, 1920, Drury as President of the Building Company entered into the contract for the building steel, with the McClintic-Marshall Company; and between that time and about March 1, all the other contracts were made by him; but

always under the supervision of Larson, President of the Bank.

3. December 10, 1919, Drury the Tailor, conveyed Lot 10 to the Building Company for $65,000 which was paid by the Bank. (Record p. 1251, Ex. 332.)

4. February 10, 1920, the Bank Directors ordered Lots 11 and 12 conveyed to the Building Company, and this was done February 25th. (Ex. 181, Record pp. 1005 and 1194.)

5. February 29, 1920, the Bank Directors authorized a contract with the New York Safe & Lock Company for the new safe deposit vault, (Ex. 183, p. ...).

6. April 19, 1920. The Bank Directors authorized a loan of $25,000.00 to the Building Company. (Ex. 183.)

7. May 7, 1920, Bank Directors authorized another loan of $25,000.00 to the Building Company. (Ex. 183.)

8. June 25, 1920, the Bank's Ledger credited the Building Company with $200,000.00 paid in full for "Sub. to Capital Stock". (Ex. 190, Record p. 1034; Ex. 250, Record p. 1180; Geiger, Record p. 1243; Ogden, Record p. 1029). The item was entered in the Building Company's Books, (Record p. 1111).

9. On the same day certificates of stock in the

Building Company were executed to the other four subscribers, (Ex. 195, Record p. 1043); in which condition they remained until they were all endorsed by the holders and transferred to the Bank (Ex. 195, Record pp. 1044-5).

Thus, the entire capital stock of the Building Company, covering all the value there was in the three lots theretofore conveyed to it, went back to the Bank, and the Building Company was left without property or resources of any kind wherewith to pay the obligations incurred in its name.

10. Every dollar that was nominally expended by the Building Company, from the preparation of its incorporation papers, to the day all work ceased, on the insolvency of the Bank, January 15, 1921, was furnished by the Bank; of course there was a lot of notes, and memoranda, and Bank bookkeeping over the money it was putting up, because the directors hoped that somehow, from somewhere, somebody would come forward with money to loan sufficient so that the Metropolitan Life $600,000 coming upon completion of the building would serve to return the Bank's advances.

11. The Bank never changed the status of the bank property—Lots 10, 11 and 12 as "Real Estate" on its books, and in its published statements of its resources. (Ex. 226, 227, 349, Record p. 1102-4; 1237).

12. When the State Banking authorities took

over the affairs of the Bank they never ceased to claim the Building Company stock as assets in their hands for liquidation, although at the same time setting up large claims for money advanced by the Bank to itself in the character of sole stockholder of the Building Company.

Therefore, when these matters had somewhat developed after the failure of the Bank, and opportunity for those who had furnished labor and materials for the building had been afforded so that they might know the facts, this appellant and others took the ground that the Building Company was the mere hand of the Bank, in the whole transaction; that the two corporations were identical and that the Bank and its assets were liable for the debts created by the Building Company insofar as the lien laws of the state or the value of the property might not cover them.

And so this appellant in filing its lien claim made both Building Company and Bank, parties thereto, asserting the former to be the agent of the latter, (Ex. 260, Record p. 889), and formally presented to the Bank Commissioner a claim for the amount alleged to be due (which was formally disallowed) (Ex. 261, Record pp. 891-6); and thereafter, when this action was commenced, by its Answer and Counterclaim, and testimony taken on the trial, consistently maintained its contention that the Building Company was merely the dummy agent of the Bank, which, as the principal was

generally liable for any deficiency that might occur upon failure either of appellant's being able to establish a lien for the whole or any part of its claim, or upon its turning out that the property was insufficient, on sale to pay the whole or any part; and the prayer of its Answer and Counterclaim was accordingly, (Record pp. 307-8). And it maintains that position now.

The evidence establishing this identity of the two corporations is all in Volume III, of the Record at the pages mentioned below, and consists of the following, viz:

1. The Minute Records of the Bank, Exhibits, as they appear.
2. The Bank's Book and papers of account as they appear.
3. Articles of Incorporation and Minute Records of the Building Company, Exhibits 178, 179, pp. 985 and 1256.
4. Testimony of Charles Drury, p. 970.
5. Testimony of G. L. Taylor, 971 to 977.
6. Testimony of George G. Williamson, pp. 978 to 1025; and 1168 to 1171.
7. Testimony of M. M. Ogden, pp. 1025 to 1035; and 1118 to 1123.
8. Testimony of O. S. Larson, pp. 1035 to 1110.
9. Testimony of C. C. Sharpe, pp. 1110 to 1115; and 1239 to 1243.
10. Testimony of J. V. Sheldon, pp. 1123-4; 1151 to 1167 and 1229 to 1232.
11. Testimony of Gustav Lindberg, pp. 1124-9.

12. Testimony of J. E. Chilberg ,pp. 1133 to 1142.

13. Testimony of James R. Thompson, pp. 1147 to 1150.

14. Testimony of Frank M. Lamborn, p. 1171-4.

15. Testimony of Claude P. Hay, p. 1182.

16. Testimony of Samuel L. Morse, pp. 1184-7.

17. Testimony of W. E. Morse, pp. 1218-1220.

18. Testimony of A. T. Geiger, pp. 1233-5; 1243-4.

19. Testimony of O. A. Jelleburg, pp. 1235-7.

The Court below, in its opinion deciding the case, because of the great number of matters to be passed upon, was able to give the litigants only the most meager discussion of the testimony, and refused relief, asked. Upon this subject all that was said was (Record p. 447):

> "It has been contended on behalf of the lien claimants that they are entitled to judgment against the Bank, as well as against the Building Company. While in certain particulars the Building Company is to be considered merely as the agent of the Bank, yet the property of the Building Company, which it was represented to have, still remains to be applied in satisfaction of any established claim. It is true that the representations that $600,000 had been secured upon the first mortgage, and that $400,000 additional was available were incorrect, still the representations fall short of such fraud on the part of the Bank and its

agents as would authorize the Court in holding that the debt created was a debt of the Bank, as well as the Building Company. Those were not representations that the Building Company owned property which it did not own, but are rather to be considered as that it had obtained credit, a part of which was secured by such property, which it did not actually have."

In discussing the Bank's contention that it was entitled to a first lien on account of the $70,000.00 paid to satisfy a first mortgage upon the Lots 11 and 12, the Court's opinion remarked. (Record p. 444):

"Were it not for the fact that control of the Building Company was had by the Bank at all times, etc.";

And again, (Record p. 444):

"The Bank was not a stranger, but its control of the Building Company created, rather a trust relation. The Building Company was, for many purposes, virtually the agent of the Bank to accomplish one of its purposes, that is, the improvement of its property, and the providing it with a banking house";

And again, in passing upon the Bank's alleged $600,000.00 mortgage claim, (Record p. 445):

"The Court finds, from the evidence, that for one purpose, at least, the Building Company was, in substance, the agent of the Bank to provide it suitable banking quarters, and that anything intended or done beyond that was incident thereto";

And again, on the subject of the Bank's assertion of a lien for the purchase price of the lots, (Record p. 446):

> "As already pointed out, the Building Company was a Company organized and controlled by the Bank to improve its property and secure for itself a banking house."

Had the decision ran, as we think it should have, to the effect that the Bank was the principal debtor, the result would have greatly simplified the labor of the Court, as it would have eliminated from the case all question of the Bank's claims for advances, which enter largely into the judgment rendered, and which will constitute one of the principal matters to be heard upon this appeal; since if the Bank was the real debtor, it could assert no equity against its creditors, either under the original $70,000.00 mortgage or under any of its other alleged contracts with or advances to its agent.

The two corporations were identical and the obligations created in the name of the Building Company were liabilities of the Bank.

To show the special importance of the foregoing proposition to this appellant, in whose favor the court below allowed no lien, but gave it a general judgment against the Building Company, only, for $13,407.43, at the same time that it allowed

the Bank a like judgment for $232,094.42, we quote here Section 1141 of Remington & Ballingers Code:

> "In every case in which different liens are claimed against the same property, the court, in the judgment must declare the rank of such lien or class of liens, which shall be in the following order:
>
> "1. All persons performing labor;
>
> "2. All persons furnishing material;
>
> "3. The subcontractors;
>
> "4. The original contractor.
>
> "And the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank; and personal judgment may be rendered in an action brought to foreclose a lien, against any party personally liable for any debt for which the lien is claimed, and if the lien be established, the judgment shall provide for the enforcement thereof upon the property liable as in case of foreclosure of mortgages; and the amount realized by such enforcement of the lien shall be credited upon the proper personal judgment, and the deficiency, if any remaining unsatisfied, shall stand as a personal judgment, and may be collected by execution against the party liable therefor."

As the decree stands, if there is no reversal of any part of it, there must be an excess of proceeds from the sale of the property, over the liens allowed of nearly or quite $300,000.00 to pay the appellant's judgment, since there are appellants, other than the Bank, who also have general judgments.

Points, Authorities and Argument as to the Bank's Liability

Where a corporation procures the creation of another corporation for its own purposes and benefit, of which it retains the whole or substantially the whole capital stock, and the control of its operations, the creator corporation will be held responsible for the new corporation's debts; since the courts will look through the corporate form set up, and any scheme of accounting that may be adopted to present an appearance of separateness, to the actual promoter and beneficiary. This result may be arrived at upon the theory of fraud, or identity of corporations or principal and agent.

Upon this subject the authorities are agreed. Some of them are:

Cook on Corporations, Vol. 3 (6 Ed.) pp. 1983, to 1988 and notes;

Clark & Marshall on Corporations, Sec. 7 (c);

Morawetz on Corporations, (2 Ed.) Vol. 1, Sec. 227;

Interstate Telegraph Co .vs. Baltimore & Ohio Tel. Co., 51 Federal, 49; affirmed,

Baltimore & Ohio Tel. Co. vs. Interstate & C. Co., 54 Fed. 50;

Re Muncie Pulp Co., 139 Fed., 546;

Re Rieger, K. & A., 157 Fed., 609-13;

New York Trust Co. vs. Bermuda, 211 Fed. 989, 998;

J. R. Foard & Co. vs. Maryland, 219 Fed. 827-9;

Grace & Co. vs. Luckenbach S. S. Co., 248 Fed. 953;

United States vs. Lehigh Valley R. Co., 254 U. S. 255;

United States vs. Deleware L. & W. R. Co., 238, U. S. 516;

Chicago E. F. Gas Co. vs. Meyers, (Ill.) 48 N. E. 66;

Chicago G. T. Ry. Co. vs. Miller, (Mich.) 51 N. W. 981;

Danovan vs. Purtell, 210 Ill. 629; 12 L. R. A., N. S. 176;

Potts vs. Schmucker, (Md.) 36 Atl. 592;
State vs. Standard Oil Co., (Ohio), 30 N. E. 279;

Brundred vs. Rice, (Ohio), 32 N. E. 169;
First National Bank vs. Trebein, 59 Ohio St. 316;

Kellogg vs. Douglas Co. Bank, 58 Kansas, 43;

Montgomery Wel. Co. vs. Denielt, 133 Pa. St. 585;

Hibernia Ins. Co. vs. St. Louis etc., Co., 13 Fed. 516;

Swift vs. Smith, Dixon & Co., 65 Md. 428; 433;

Evans vs. Kingston Coal Co., 6 Luzerne Legal Reg. (Kulp.) 351;

Louisville Banking Co. vs. Eisenmann, (Ky.) 21 S. W. 531; 19 L. R. A., 684;

Chicago, M. & St. P. Ry. Co. vs. Minneapolis Civic & Co., Assn., 247 U. S. 490, 500.

In the last cited case the following is said:

"Much emphasis is laid upon statements made in various decisions of this court that ownership, alone, of capital stock in one corporation by another, does not create an identity of corporate interest between the two companies, or render the stockholding company the owner of the property of the other, or create the relation of principal and agent or representative between the two; (Citing cases).

"While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to not for the purpose of participating in the affairs of a corporation in the normal and useful manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or intrumentality of the owning company or companies. *United States vs. Lehigh Valley R. Co.*, 220 U. S. 257, 273; 55 L. Ed. 458, 463; 31 Sup. Ct. Rep. 387 and *United States vs. Delaware, L. & W. R. Co.*, 238 U. S. 516; 59 L. Ed. 1438; 35 Sup. Ct. Rep. 873. In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

All of the foregoing are cases clear in their support of the proposition we make. They cover cases of many different circumstances, including contracts and torts, clear cut frauds and perfectly legitimate transactions except as against creditors.

Fraud is not necessary to support identity of corporations.

Of course there are any number of cases in the books where, on the facts, liability was not found to exist, and there has been, in some quarters, a tenacious holding to separate and sole responsibility. But even in New York, where there was some reluctance in recognizing the principle, it was said in, *Anthony vs. American Glucose Co.*, 146 N. Y. 407:

> "We have of late refused to be always and utterly trammeled by the logic derived from corporate existence where it only serves to distort or hide the truth."

And in *Seymour vs. Spring*, 144 New York, 333-340:

> "The abstraction of the corporate entity should never be allowed to bar out and pervert the real and obvious truth."

Private banks in the State of Washington are chartered and governed by the provisions of Chapter 80 of the Laws of 1917, which is a complete bank code. Sections 20 to 55. The general powers are defined in Section 23; and specific authority to hold real estate and borrow money is given by Section 37 and 54 respectively. They are given no power to mortgage real estate.

Provision is made for banking premises, thus:

"A Bank or trust Company may purchase, hold and convey real estate for the following purposes and no other:

"Such as shall be necessary for the convenient transaction of its business, including with its banking offices other apartments in the same building to rent as a source of income: *Provided*, That as to any corporation hereafter organized not to exceed thirty per cent of its capital and surplus and undivided profits may be so invested: *And provided further*, Any bank or trust company heretofore organized shall not hereafter invest in the aggregate to exceed thirty per cent of its capital, surplus and undivided profits in a bank building without the approval of the State Bank Examiner."

The incorporation of the Building Company was for the purpose of evading the restrictions of the Bank's charter, of not appearing to have much of the Bank's money invested in real property, and of having the reputation of owning a magnificent architectural pile as a place of business. This business building it proposed to acquire, not by the use of the percentage of its capital, surplus and undivided profits, but solely by borrowing upon mortgage of the premises, which was *ultra vires*, and by controlling the Building Company through stock ownership.

In *United States vs. Lehigh Valley Railway Co.*, 254 U. S. 255, the railway company to perpetuate its monopoly of the anthracite coal business in Pennsylvania, and to avoid the Interstate Commerce

and Sherman Anti-Trust Acts, and the constitution of Pennsylvania, which prohibited a common carrier from mining coal, first organized a coal company, the stock of which was owned by the railway company, to take over its coal lands and do the business of mining and marketing. Next it "suggested" the organization of a sales company, 97 per cent of which was to be taken by stockholders of the railway company through the payment of a dividend on railway stock; and the sales company "bought" the coal produced by the Coal Company; the directors of the three companies were pretty much the same.

After stating the facts which justified breaking up the combination, the court remarked:

> "Sufficient has been stated to make it clear beyond controversy that the Coal Company was organized and conducted as a mere agency or instrumentality of the Railway Company, for the purpose of avoiding the legal infirmity which it was thought might inhere in the owning of coal lands, etc., etc."

And of the Sales Company, it said:

> "It is too plain for discussion that, with a Company thus organized and officered the making of a contract by the Coal Company, for the sale of all of its coal to the Sales Company, was in substance and effect, making a contract with itself, the terms of which it could determine at discretion."

These rulings are pertinent to the situation

here, where the only action of either corporation ever recorded was taken by Bank directors, who were also Building Company directors, in Bank Meeting; and where notes and other pretended evidences of indebtedness, with mortgages to secure them, assignments, etc., were executed by Bank Officers in the name of the Building Company without any vestige of authority, even, from the dummy corporation.

Referring to some cases which hold the principal, whether individual or corporation, liable for the obligations of the dummy agent, *Interstate Telegraph Co. vs. Baltimore & Ohio Telegraph Co.*, 51 Federal, 49, affirmed on appeal in 54 Federal, 50, is in point. The Baltimore & Ohio Telegraph Company, having an extensive telegraph system, procured the organization of the Baltimore & Ohio Telegraph Company of Baltimore County, with a capital stock of $100,000; subscribed for all the stock, and put in some of its employees as directors and officers. The International Telegraph Company entered into a contract with the Baltimore & Ohio Telegraph Company of Baltimore County, which the latter breached; the outcome being a judgment in favor of the former against the latter, which could not be collected, because of "no property": held that the parent company should pay the judgment, because its creature, the Telegraph Company, of Baltimore County was only its agent, and mere name.

W. R. Grace & Co. vs. Luckenbach S. S. Co., 248 Federal, 953, involved damages for the violation of a contract to carry freight by the Luckenbach Steamship Company, which was a dummy corporation promoted by the Luckenbach Company, a large owner of vessels. The suit was against both companies and both were held liable, the opinion saying at the foot of page 955:

> "Moreover, they are liable under the doctrine of principal and agent."

In *Chicago Economic Fuel Gas Co. vs. Meyers*, 48 N. E. 66 (Ill.), the liability of two corporations related in this manner was sustained where the cause of action was damages for personal injuries of a workman.

Louisville vs. Eisenmann, (Ky.) 21 S. W. 531; 19 L. R. A. 684, stated the reasons behind such ruling, thus:

> "It could not have been the legislative intent that any one man could form a corporation of which he is the creator and sole stockholder, so as to limit his liability for debts contracted, and from which he has derived benefit to the extent only of what he might designate his corporate estate. He owns the entire property belonging to the corporation. It is his. He can sell or dispose of it as he pleases; borrow money; acquire property in the name of the corporation for the sole purpose of exempting him from any responsibility other than that belonging to the corporation; and, however reck-

> less or improvident he may be, has all to gain and nothing to lose. He could make a gift of the entire corporate estate, and dispense with all corporate forms; and to say, when exercising such unlimited control, he is not personally responsible, for every debt he contracts would be to pervert the plain purpose of the statute. There is no such being in this state as a sole corporation, and certainly none such allowed to be created by the statute."

Now practically every generic fact in any of the cases cited on this subject, exists in the case at bar; and here we have the added fact that the Building Company was never really organized. Some of its appointed directors did not know of their appointment; only four of them qualified by taking the statutory oath; no meetings were held, even the prescribed annual meeting being entirely omitted; the Articles of Incorporation were not filed with the County Auditor until after the President, who was also Chairman of the Bank's Board of Directors, had been making all the important building contracts for more than a month. Every move was dictated and directed by the Bank's President, Mr. Larson, who, even from New York, tried to stop the building program by a telegram to Drury ordering him not to tear down the old building, because his financial arrangements seemed to have gone wrong.

In the Spring and summer of 1920, there was a vexatious delay in the shipment of steel for construction by the contractor, McClintic-Marshall

Company, and numerous letters of remonstrance were written;—by whom? By Drury? Not at all, excepting one evidently intended to lay the foundation for a claim for damages on account of an expected raise in freight rates. Seven or eight of these letters were written by Larson from the Banks' office, signed by himself as "President", upbraiding the Steel Company for jeopardizing the reputation of the Bank in the eyes of the public by causing delay in the construction of its building . (Record Ex. Taylor 7 to 14, pp. 971-8.)

Why, then, should not the court which found and reiterated that the Building Company was the Bank's agent, as hereinabove quoted, have made its conclusion of law accordingly, and held the Bank, as principal, responsible in that capacity, for any excess over the proceeds of the property?

At the hearing below, counsel for the Bank's representative, cited many cases where identity of corporations had not been found to exist, as might well be done, only one of which we shall refer to, as it will probably be cited here as of importance because it was one from the Supreme Court of Washington. This was *State ex rel Tacoma vs. Tacoma R. & P. Co.*, 61 Wash. 512. But that was not a case of a dummy corporation. To the exact contrary, it is clearly stated in the opinions, both prevailing and dissenting, that the two corporations when organized were competing and hostile; and it was not until after years of operation in that

form, that, by the purchase of a majority of the Traction Company stock, the control of that corporation was obtained by the Tacoma Railway & Power Company. And further, the case was not maintained on any ground of identity of corporations, but because the Tacoma Railway & Power Company had contracted with the City of Tacoma for transfers to and from lines "operated under this franchise."

The basic contention was, that without reference to any stock matter, the Traction line had come to be "operated" by the T. R. & P. Co., under its franchise. Judge Dunbar, dissenting on p. 515 of the report said:

> "There were two lines built and operated as competing lines. The competition was intense to the extent that ordinary courtesies were refused. There was no trackage connection and of course no exchange of cars. The Traction Company managed its affairs in every particular."

Certainly there is no parallel between that case and this; and just as little parallel will be found in any other case where identity was not found as a fact.

It is submitted, therefore, that as provided by the statute, the general judgment should have been entered in favor of this appellant, against the Bank, and established as a claim upon the assets in the Bank Supervisor's hands, as to any deficiency after

exhaustion of the liened property, in accordance with the prayer of Ben Olson Company's Cross-Complaint.

Sixth Error

The Court erred in entering a general judgment in favor of J. P. Duke, as Supervisor of Banks of the State of Washington, against the Scandinavian American Building Company for $232,094.42 and interest, amounting to $19,136.62. (Decree Par. XXXVIII, Record pp. 524-5.)

The Court did not in its opinion, discuss the relations of the Bank and the Building Company, except as it, by the frequent remarks hereinbefore quoted, held that for certain purposes, the Building Company was the agent of the Bank to construct a building for the use of the latter. All there is in the opinion on this subject is to be found on pages 442 to 447, of the Record.

It merely remarked, on p. 446:

> "I find no equity in the Bank or its receiver" (meaning the Supervisor) "arising out of these transactions, and hold the Bank's Receiver a general creditor on account of such advances."

In Paragraph XXXVI, of the Decree, (Record p. 523), in holding the assignment of the $600,000 mortgage to Duke, Supervisor, void, the final reason for such action is given, thus:

"and that Scandinavian American Building Company was the agent of the defendant, Scandinavian American Bank of Tacoma for the purpose of providing the said bank with suitable quarters, and was at all times subject to the control of, and controlled by, said Bank, and that by reason of the trust relation thereby arising, the defendant, etc., etc."

The Supervisor of Banking, taking over a failed bank, stands in the shoes of the bank.

Moore, State Bank Examiner vs. American Savings Bank & Trust Company, 111 Wash. 148-158.

The Supervisor of Banking, in Washington, exercises the same authority as the former Bank Examiner.

We are not interested in Paragraph XXXVII of the Decree (Record p. 524), which, it seems to us, quite inconsistently, gave the Supervisor a judgment against the Building Company for Seventy-odd Thousand Dollars on account of money he had paid to take up the first mortgage for $70,000, because it was made expressly inferior and subordinate to every other judgment therein decreed against the Building Company.

But then comes Paragraph XXXVIII, which reads:

"That from time to time during the year 1920, and prior to January 15, 1921, defendant, Scandinavian American Bank of Tacoma, ad-

vanced to and for the benefit of defendants Scandinavian American Building Company, various amounts aggregating $232,094.42, no part of which has been repaid, and that on account thereof, J .P. Duke, as Supervisor of Banks for the State of Washington, be and he is hereby decreed to have and recover judgment against said Scandinavian American Building Company in the sum of $232,094.42, and interest amounting to $19,136.62, and for his costs and disbursements to be taxed herein the sum of $....."

This judgment, it will be noted, is not declared to be "inferior and subordinate" to other judgments, and therein this appellant is interested, especially if in this appeal it should be allowed no lien for the whole or a part of the sum finally awarded it, and the Bank should not be held to be the principal debtor on account of the corporate identity of the two corporations.

We shall not here weary this Court with any argument to sustain Judge Cushman's rulings upon the $70,000.00, the $350,000.00, and the $600,-000.00 claims of the Supervisor. These matters are elaborately and exhaustively presented in the Brief of Robert S. Holt, Esq., Counsel for the Far West Clay Company, which Brief we desire to refer to and adopt as our own argument on that subject.

But what Court ever rendered judgment in favor of a principal against his agent employed by him to perform a certain work, as, for example,

to construct a bank building for the use of the principal, for the money advanced by the principal to the agent to pay the cost of the work, and expended exactly in accordance with the principal's instructions, and under his domination and control?

No fraud, no misappropriation, no failure anywhere, except that the principal did not, in one way or another, furnish enough money to finish the project, and the agent held responsible to repay the money it expended as directed!

And not only that, but the principal is placed on an equal footing so far as the only resource which the agent has to pay the people who, through the (let us call them) mistaken representations of the principal, itself, were led to give credit to the agent for thousands of dollars worth of services and property, going into the construction of the bank building for the benefit of the principal.

The Building Company will make no resistance to this absurdity. The Bank and the Building Company were one, from President to pen-wiper; the Supervisor and his deputy, and the Building Company's Receiver, are one, the Receiver fighting all creditors to assist the Supervisor in getting from them the last possible scrap of property standing in the name of the sham corporation. The counsel for the Supervisor and the Building Company are the same—paid out of the Bank's assets. Therefore, there will be no resistance to the judgment complained of, from that quarter. The court

said the Bank was in control of the Building Company, and, by the course of the Supervisor in this case ,he still seeks to control it. At every point but this one, he has met defeat, and he clings to this crumb because, if he can avoid the corporate identity proposition, and sustain this judgment, and if there should be realized from the sale of the lots more than enough to pay off the liens, attorney's fees and costs, he will take practically all the excess, since his judgment by its amount overwhelms the others of equal rank.

The judgment, ought to be reversed, or at least subordinated to every other judgment in the case, as was the $70,000.00 mortgage judgment, as the same "equities" exist in both cases.

The same estoppel should apply that led the Court to sustain the waiver of the lien clause in the contract. The representations as to the financing came from the Bank, which had conducted all the negotiations for a loan before the Building Company was organized, and whose President assured contractors not only that the completion loan was arranged for, but that "if necessary we" (the Bank) "can finance the whole thing ourselves."

But, as we have before remarked, if our contention that the Building Company was only the shadow of the Bank, and that the latter should be held responsible for every obligation undertaken in the Building Company's name, all these discus-

sions will be obviated, and the disposition of all the cases before the Court will be simple and easy.

Respectfully submitted,

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